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Consultation, Mediation, Negotiation, Analysis and Writing in Cultural Resource Management, Archaeology and Historic Preservation

March 2, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington DC 20554

Filed Electronically

Re: *Ex Parte* Presentation in the Proceeding entitled "Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process," WT Docket No. 03-128

Dear Ms. Dortch:

I have several observations to make and recommendations to offer regarding FCC's possible Programmatic Agreement under Section 106 of the National Historic Preservation Act.

Observation #1: A huge mountain has been created over what should be the tiny molehill of FCC compliance with Section 106 in its regulation of wireless telecommunications facilities. This matter could be resolved without great difficulty if people would get off their soapboxes and reason together.

Observation #2: The primary complication in FCC's compliance with Section 106 lies in its own National Environmental Policy Act (NEPA) regulations. These regulations do two critically wrong things. First, they require that applicants prepare an Environmental Assessment (EA) whenever they will have any kind of effect on a historic property – this is a far higher level of effort than is required by the Section 106 regulations. Second, they send applicants to State Historic Preservation Officers (SHPOs) to find out about historic properties. Since SHPOs cannot possibly know where all the historic properties are, they naturally tell applicants to do surveys to identify them. They also naturally (if rather unthinkingly) tell applicants to follow standard procedures for

identification that are not necessarily very appropriate to the circumstances. Applicants understandably object to these requirements.

Observation #3: The major problem with Section 106 review of wireless facilities lies in the consideration of visual effects.

Observation #4: Historic properties have no eyes, and are thus unlikely to be visually offended by towers in their vicinity. However, Congress mandated that historic properties be considered in planning not out of tender concern for the feelings of the properties, but because keeping such properties is understood to be in the public interest. Projects like telecommunications towers do have adverse effects on people who look at, or look out from, historic properties, and these effects are correctly understood for Section 106 purposes to be effects on historic properties. Visual effects have been considered under Section 106 since the very earliest days of the Section 106 process. Indeed, one of the earliest Section 106 cases, involving a power plant across the river from Saratoga Battlefield in New York State, was entirely about visual effects.

Observation #5: The notion that has been advanced by representatives of the wireless industry and their friends in Congress, that Section 106 should apply only to consideration of properties included in or formally determined eligible for the National Register not only flies in the face of some 30 years of interpretation and practice, but would wreak havoc if put into effect. It would, in fact, significantly *complicate* the process of historic property identification by requiring that every property evaluation be vetted by the Secretary of the Interior. Or it would exclude from consideration any property that someone had not gone to the trouble and expense to get formally nominated to or otherwise formally addressed by the Register, thus discriminating against the places valued by low-income and minority groups.

Observation #6: There is considerable confusion between the requirement of the Section 106 regulations that a "reasonable and good faith effort" be made to identify historic properties, and the procedures of many SHPOs that insist on particular kinds of surveys. There is no requirement for surveys in the regulations, but there is, and must be, a requirement that historic properties and effects be identified, so that they can be considered. Identification typically requires some kind of study, but it does not require a standard-form survey.

Observation #7: Under the Section 106 regulations, it is up to the responsible Federal agency – in this case FCC – to determine what constitutes a "reasonable and good faith effort" to identify historic properties. This determination is not made by the SHPO, the Advisory Council on Historic Preservation, or anyone else; it is to be made by FCC.

Recommendations:

1. FCC should:

A. Suspend work on the Programmatic Agreement, whose pursuit is only exacerbating confusion and conflict.
B. Establish its own standards for a reasonable and good faith identification effort.
C. Rework its NEPA regulations to eliminate the need for an EA whenever there is an effect on historic properties; an EA should be required only when there is an unresolved adverse effect, if at all.

2. A reasonable and good faith effort to identify historic properties subject to effect by a wireless facility should include:

A. Consultation with people and groups subject to visual effects by the project (residents, visitors, Indian tribes, etc.) to determine whether they object to the effects on cultural/historical grounds; if they do, the properties they are concerned about should be considered historic without further study, and effects on them should be resolved under Section 106, while if they do not have problems with the effects, no further identification should be required.
B. Identification of direct physical effects on archeological sites, historic buildings, etc. – that is, those properties that would be physically changed by the project.

Thank you for the opportunity to comment.

Sincerely,

Electronically submitted by Thomas F. King